Supreme Court, U.S.
FILED
MAR 21 1996
CLERK

(3)

No. 95-1159

In The

Supreme Court of the United States

October Term, 1995

NANSAY HAWAII, INC.,

Petitioner,

v.

PUBLIC ACCESS SHORELINE HAWAII AND ANGEL PILAGO,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Hawai'i

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DENISE E. ANTOLINI
Counsel of Record
LEA O. HONG
DAVID L. HENKIN
Sierra Club Legal Defense Fund
223 South King Street
4th Floor
Honolulu, Hawai'i 96813
(808) 599-2436

CARL C. CHRISTENSEN
Native Hawaiian Legal Corporation
1164 Bishop Street
Suite 1205
Honolulu, Hawai'i 96813
(808) 521-2302

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

24pp

QUESTION PRESENTED FOR REVIEW

Is Petitioner's constitutional challenge unripe for review where there has been no final decision on Petitioner's application for a Special Management Area Use Permit because the Hawai'i Supreme Court remanded to the county administrative agency for an evidentiary hearing on Petitioner's permit application?

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

STATEMENT OF JURISDICTION 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

I. THIS COURT LACKS JURISDICTION TO REVIEW THE JUDGMENT OF THE HAWAI'I SUPREME COURT SINCE IT IS NOT "FINAL" WITHIN THE MEANING OF 28 U.S.C. § 1257(a) 4

II. PETITIONER'S TAKINGS CLAIM IS NOT RIPE.. 8

III. THE HAWAI'I SUPREME COURT'S ANALYSIS OF CUSTOMARY RIGHTS DID NOT DEPRIVE PETITIONER OF DUE PROCESS 13

A. The Hawai'i Supreme Court's Decision Ensures Ample Opportunities for Petitioner To Challenge Respondents' Claims to Customary Rights 13

B. The Hawai'i Supreme Court Properly Applied Background Principles of Hawai'i Property Law 14

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

Abbott Laboratories, Inc. v. Gardner, 387 U.S. 136 (1967) 8

Bonelli Cattle Co. v. State of Arizona, 414 U.S. 313 (1973), *overruled on other grounds, Oregon v. Corvallis Sand & Gravel Co.*, 420 U.S. 363 (1977) 12

Boquillas Land & Cattle Co. v. Curtis, 213 U.S. 339 (1909) 17

Branca v. Makuakane, 13 Haw. 499 (1901) 16

Cariño v. Insular Government of the Philippine Islands, 212 U.S. 449 (1909) 16

Corporation of Presiding Bishop v. Hodel, 830 F.2d 374 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1015 (1988) 12

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 7

Damon v. Territory of Hawai'i, 194 U.S. 154 (1904) 17

Hughes v. Washington, 389 U.S. 290 (1967) 5, 12

Illinois v. Gates, 462 U.S. 213 (1983) 4

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 10

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 15

McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430 (1940) 4

Minnick v. California Dept. of Corrections, 452 U.S. 105 (1981) 7

TABLE OF AUTHORITIES – Continued

Page

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 9, 10

North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973) 5

Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988) 5

Public Access Shoreline Hawai'i and Pilago v. Hawai'i County Planning Comm'n, 900 P.2d 1313 (Haw. Ct. App. 1993) 1, 2

Public Access Shoreline Hawai'i and Pilago v. Hawai'i County Planning Comm'n, 903 P.2d 1246 (Haw. 1995) ..... *passim*

Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62 (1948) 5, 7

Robinson v. Ariyoshi, 887 F.2d 215 (9th Cir. 1989), *vacating*, 676 F. Supp. 1002 (D. Haw. 1987), *remanded for reconsideration by*, 477 U.S. 902 (1986), *vacating*, 753 F.2d 1468 (9th Cir. 1985), *aff'g*, 441 F. Supp. 559 (D. Haw. 1977) 10, 11, 12

Stevens v. City of Cannon Beach, 854 P.2d 449 (Or. 1993), *cert. denied*, 114 S. Ct. 1332 (1994) 13, 14

Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) 8, 9, 10, 11, 12

Yee v. City of Escondido, 503 U.S. 519 (1992) 10

CONSTITUTIONAL AND STATUTORY PROVISIONS

28 U.S.C. § 1257(a) 1, 3, 4, 5, 7

Haw. Const. art. XII, § 7 ..... 2, 16

TABLE OF AUTHORITIES – Continued

Page

Haw. Rev. Stat. § 1-1 (1993 Repl.) 2, 16

Haw. Rev. Stat. § 91-9(c) (1993 Repl.) 14

STATEMENT OF JURISDICTION

The United States Supreme Court lacks jurisdiction to review the Hawai'i Supreme Court's August 31, 1995 opinion and September 20, 1995 judgment since the Hawai'i Supreme Court's decision is not "final" within the meaning of 28 U.S.C. § 1257(a). Respondents will discuss this jurisdictional bar in their analysis of the reasons for denying the writ, *infra*.

STATEMENT OF THE CASE

Respondents will not duplicate the factual and procedural summaries provided by the Hawai'i Supreme Court in *Public Access Shoreline Hawai'i and Pilago v. Hawai'i County Planning Comm'n*, 903 P.2d 1246, 1250-51 (Haw. 1995) (hereinafter *PASH/Pilago II*), Petitioner's Appendix ("App.") at 3a-7a, and the Hawai'i Intermediate Court of Appeals in *Public Access Shoreline Hawai'i and Pilago v. Hawai'i County Planning Comm'n*, 900 P.2d 1313, 1315-19 (Haw. Ct. App. 1993) (hereinafter *PASH/Pilago I*), App. at 66a-74a. Rather, Respondents will highlight two major factual omissions and misstatements in the Petition.

First, Petitioner's mantra of unconstitutional "takings" cannot alter one simple fact – the Hawai'i Supreme Court's decision did not "take" anything from Petitioner. The court merely required a new administrative hearing. It found that Respondent Public Access Shoreline Hawai'i ("PASH") has standing to request and participate in an administrative hearing ("contested case") before the

Hawai'i County Planning Commission ("HPC") regarding Petitioner's application for a Special Management Area Use ("SMA") permit under Hawai'i's Coastal Zone Management Act, Hawai'i Revised Statutes Chapter 205A. *PASH/Pilago II*, 903 P.2d at 1255-56, App. 17a-18a.[1] The court did *not* deny Petitioner a permit to develop its property. The court did *not* require Petitioner to allow persons onto its land as a condition of a permit. The court did *not* deny Petitioner a further hearing.

Second, Petitioner's claim that the Hawai'i Supreme Court's interpretation of Hawaiian customary rights is an "unwarranted" declaration of a "pretextual custom," Petition, at 12, ignores the unique role that custom has long played in the development of Hawaiian property law. Judicial recognition that customary rights have legal effect is well established in Hawai'i. In its first written laws, dating from the 19th century, the Kingdom of Hawai'i recognized the continued vitality of Hawaiian custom.[2] The continuing force of Hawaiian custom is reflected in the form of Article XII, Section 7 of the Hawai'i Constitution and Section 1-1 of the Hawai'i

---

[1] In support of its request for a contested case, PASH, an environmental public interest association, asserted that a Hawaiian member of PASH and his family exercise constitutionally-protected traditional and customary rights of gathering 'ōpae 'ula and 'ōpae lōlō (shrimp) in anchialine (brackish) ponds located on the Petitioner's property and that the Petitioner's resort development threatens the exercise of these rights. *PASH/Pilago I*, 900 P.2d at 1318, App. at 73a-74a.

[2] The Hawai'i Supreme Court canvassed and analyzed many of these early laws. *See, e.g., PASH/Pilago II*, 903 P.2d at 1258 n.21, 1261 n.24, 1262 n.27, 1267 n.35, 1269, App. at 24a n.21, 31a n.24, 34a n.27, 47a n.35, 53a.

Revised Statutes (1993 Repl.). Petitioner's cursory recitation of facts fails to come to terms with the Hawai'i Supreme Court's extensive discussion of the unique history and origins of these laws. *PASH/Pilago II*, 903 P.2d at 1258-71, App. 23a-57a.

REASONS FOR DENYING THE WRIT

The fatal flaw in the Petition for a Writ of Certiorari is that this case is simply not sufficiently final or ripe for this Court's review. Contrary to Petitioner's characterization, the Hawai'i Supreme Court's decision did not rise to the level of a taking of private property without due process of law. Rather, the decision merely acknowledges that, when customary practices are threatened by private land development of a coastal area, native Hawaiians who allege a tradition and custom of gathering there have standing to obtain an administrative hearing where they can assert those rights. Whether the future administrative hearing required by the court in this case will result in any conditions on Petitioner's development and whether any such conditions might result in an unconstitutional taking are questions that cannot be answered until the hearing and state appeals, if any, are completed. Granting certiorari now, before state administrative and judicial proceedings are completed, would not only waste this Court's limited resources but would also exceed this Court's jurisdiction under 28 U.S.C. § 1257(a).

Moreover, Petitioner's claim that the decision of the Hawai'i Supreme Court constituted a violation of due

process does not stand up under scrutiny.[3] The Hawai'i Supreme Court's detailed discussion of the unique role of custom in the development of state property law amply demonstrates that the court's determination that Respondents are entitled to a contested case is firmly rooted in the background principles of state law. In addition, the court's remand to the HPC for a future evidentiary hearing guarantees that Petitioner will have ample opportunities to challenge Respondents' claims to customary rights. These three central issues – finality, ripeness and customary law – are discussed in Sections I, II and III below.

I. THIS COURT LACKS JURISDICTION TO REVIEW THE JUDGMENT OF THE HAWAI'I SUPREME COURT SINCE IT IS NOT "FINAL" WITHIN THE MEANING OF 28 U.S.C. § 1257(a).

This Court must deny the writ of certiorari in this case since it lacks jurisdiction to review the Hawai'i

---

[3] Respondents note that, to the extent that Petitioner is attempting to raise a due process violation distinct from the alleged judicial taking, Petitioner did not make any such claim below. Review of the petition to the Hawai'i Supreme Court and Petitioner's *five* supplemental briefs to that court reveals that, although Petitioner may have used the term "due process" in passing, it never raised a due process claim independent of its takings claim. It is virtually axiomatic that this Court will not consider a question to meet the "important federal question" requirement necessary to invoke this Court's jurisdiction when the question was not properly raised in the state court proceedings. *See Illinois v. Gates*, 462 U.S. 213, 218-20 (1983); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-35 (1940).

Supreme Court's judgment. 28 U.S.C. § 1257(a) authorizes Supreme Court review only of "*final* judgments or decrees rendered by the highest court of a State in which a decision could be had. . . . " (Emphasis added). This limitation on Supreme Court jurisdiction dates back to the Judiciary Act of 1789 and serves several important purposes:

> (1) it avoids piecemeal review of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real "case" or "controversy" in the sense of Art. III; (3) it limits review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs.

North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 159 (1973).

Insisting on finality is particularly important when a constitutional challenge attacks "a State court's decision on matters peculiarly of local concern." *Republic Natural Gas Co. v. Oklahoma* (hereinafter *Republic*), 334 U.S. 62, 67 (1948). Here, Petitioner challenges Hawai'i's interpretation of its own law of real property, a domain that the federal Constitution generally leaves "to the individual States to develop and administer." *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 484 (1988) (*quoting Hughes v. Washington*, 389 U.S. 290, 295 (1967) (Stewart, J., concurring)).

In this case, the Hawai'i Supreme Court has not reached a final decision regarding the applicability of federal "takings" law to any custom-based limitations

that may (or may not) be imposed on Petitioner's activities at Kohanaiki.[4] The court simply held that PASH's allegations were sufficient to establish its standing to request and participate in a contested case. *PASH/Pilago II*, 903 P.2d at 1255-56, App. at 17a-18a. The court then remanded to the HPC for further administrative hearings to determine, among other things, (1) the validity of Respondents' claims to traditional and customary practices at Kohanaiki, (2) the impact, if any, of Petitioner's proposed development on the reasonable exercise of any traditional and customary practices that Respondents establish, and (3) the reasonable conditions, if any, that might be imposed upon Petitioner's permit to protect such practices.

The Hawai'i Supreme Court's instructions on remand to the HPC highlight the lack of finality in this case:

> In the instant case, the HPC must consider PASH's *alleged customary rights* on remand . . . *[I]f* such rights are established, the HPC will be obligated to protect them *to the extent possible*. This *may* involve the placement of conditions on Nansay's permit to develop land. *No determination as to the extent of any applicable limitations on Nansay's ability to develop its land may be made until the HPC holds a contested case hearing in accordance with this opinion*.

---

[4] Petitioner's proposed project is located in the ahupua'a of Kohanaiki. An "ahupua'a" is a traditional Hawaiian land division usually extending from the mountains to the sea along ridges or other natural characteristics. *PASH/Pilago II*, 903 P.2d at 1250 n.1, App. at 4a n.1.

Id. at 1273, App. at 62a (emphasis added). Of course, following the contested case, Petitioner will be free to challenge in court the HPC's ultimate decision on the SMA permit application.

Since further state administrative and judicial proceedings may very well dispose of Petitioner's constitutional claims, the Hawai'i Supreme Court's decision is not "final" for purposes of 28 U.S.C. § 1257(a). *See Republic*, 334 U.S. at 71. The fact that further proceedings on remand to the HPC are needed to remove factual ambiguities that preclude an informed judgment on Petitioner's constitutional claims underscores this lack of finality.[5] *See Minnick v. California Dept. of Corrections*, 452 U.S. 105 (1981). Moreover, this case does not fall within any of the narrow exceptions to the finality requirement recognized in *Cox Broadcasting Corp. v. Cohn* (hereinafter *Cox*), 420 U.S. 469 (1975).[6] Accordingly, this Court lacks jurisdiction to entertain Petitioner's claims.

---

[5] In addition to the uncertainty over the nature and extent of the custom-based limitations, if any, that may be imposed on Petitioner's activities, the ownership of the anchialine ponds at issue is in doubt. The State of Hawai'i asserts title to these ponds as "public trust" lands because they are submerged and affected by the tides. *PASH/Pilago II*, 903 P.2d at 1257 n.20, App. at 22a n.20.

[6] As an initial matter, the outcome of the further state proceedings that the Hawai'i Supreme Court has ordered is far from "preordained." *Cox*, 420 U.S. at 479. The HPC might reject Respondents' claims to customary rights at Kohanaiki; it might recognize such rights but find that limitations on Petitioner's development plans are either unnecessary or infeasible; or it might impose limitations that Petitioner finds acceptable. In any of these cases, Petitioner's federal claims would not "survive and require decision regardless of the outcome of future [state] proceedings." *Cox*, 420 U.S. at 480. Moreover, following the

II. PETITIONER'S TAKINGS CLAIM IS NOT RIPE.

The jurisdictional requirement that a state court judgment be "final" before this Court can grant review, discussed *supra*, is one component of the broader ripeness doctrine. In *Abbott Laboratories, Inc. v. Gardner*, 387 U.S. 136 (1967), this Court explained that, to determine whether a case is ripe, a court must evaluate several factors, including the finality of the government action at issue. *Id.* at 149. Since, in this case, the Hawai'i Supreme Court's order remanding to the HPC does not constitute a final decision on Petitioner's permit application, Petitioner's challenge to that decision necessarily fails to satisfy the ripeness test.

In the landmark case of *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), this Court confirmed that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a *final decision* regarding the application of the regulations to the

---

contested case proceedings, Petitioner will have ample opportunity – in state court and before this Court – to challenge on constitutional grounds any limitations the HPC may impose on Petitioner's development plans. *See id.* at 481-82. Finally, refusal immediately to review the Hawai'i Supreme Court's decision would not "seriously erode federal policy." *Id.* at 483. On the contrary, as noted above, the federal Constitution generally leaves to the States the development and administration of the law of real property. Indeed, intervention by this Court now, before Hawai'i has had an opportunity to strike the balance between customary rights and modern development, would constitute a serious and unnecessary intrusion on State prerogatives.

property at issue." *Id.* at 186 (emphasis added). After all, "until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question," a court simply cannot evaluate the key factors in the takings inquiry: "the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations." *Id.* at 191.

Since the HPC has not taken any final action on Petitioner's application for a SMA permit, it is clear that any claim of regulatory taking is hopelessly premature. Petitioner concedes as much. *See* Petition, at 25 n.13 ("Petitioner has never made a regulatory takings claim."); Nansay's Haw. S. Ct. Second Supplemental Brief, App. at 146a. Nonetheless, even though no conditions have been placed on the development of Petitioner's lands, Petitioner insists that the Hawai'i Supreme Court's decision has somehow "transformed native Hawaiian gathering rights into a *permanent* physical occupation of land, thus amounting to a compensable taking." Petition at 23 (emphasis in original). However, the procedural posture of this case belies Petitioner's claim; at this stage, Petitioner's permit application has neither been denied nor conditioned in any way.

This case is not, as Petitioner asserts, "analytically indistinguishable" from *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). Petition, at 23. In *Nollan*, the takings issue was ripe for this Court's consideration since the California Coastal Commission had reached a final determination conditioning the approval of a coastal development permit on the Nollans' willingness to grant the public an easement across a portion of their property.

483 U.S. at 828. In contrast, in the present case, the HPC has not yet had a chance to determine whether any conditions will be imposed on Petitioner's development plans.

The fact that Hawai'i has not required Petitioner to grant access to anyone also distinguishes the physical occupation cases cited by Petitioner. Petitioner itself quotes *Yee v. City of Escondido*, 503 U.S. 519 (1992), where this Court stressed that "[t]he government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of its land." Petition at 23 (*quoting Yee*, 503 U.S. at 527) (emphasis in *Yee*). In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), New York's requirement that landlords allow television cable companies to emplace cable facilities in their apartment buildings was a minor, but real, physical intrusion. In contrast, no physical invasion of Petitioner's property has been authorized at this time by the Hawai'i court's decision.

Petitioner's preemptive strike on the principles expressed in the Hawai'i Supreme Court's decision most closely resembles the failed claims advanced by the private landowners in *Robinson v. Ariyoshi*, 887 F.2d 215 (9th Cir. 1989).[7] In *Robinson*, a sugar plantation claimed that a

---

[7] The *Robinson* case had a long history in the federal court system. The original district court judgment, 441 F. Supp. 559 (D. Haw. 1977), was affirmed by the Ninth Circuit at 753 F.2d 1468 (9th Cir. 1985). This Court then vacated the Ninth Circuit's judgment and remanded for further consideration in light of *Williamson County*, 477 U.S. 902 (1986). The district court confirmed its prior ruling at 676 F. Supp. 1002 (D. Haw. 1987). However, as discussed, *infra*, the Ninth Circuit vacated the district court's opinion on the grounds that the case was not ripe and remanded with instructions to dismiss. 887 F.2d at 216.

Hawai'i Supreme Court decision recognizing the English common law doctrine of riparian rights had reversed settled principles of state water law, resulting in an unconstitutional taking of its vested rights to collect and transport water out of the watershed. In analyzing the landowners' claim, the Ninth Circuit looked to this Court's decision in *Williamson County*, which "affirmed the principle that the ripeness of a takings claim turns on whether the government entity charged with a taking has reached a final decision as to the property interest in question." *Id.* at 218. Since, "[t]o date, the State ha[d] not interfered in any way with the parties' use or diversions of the waters [they claimed]," the Ninth Circuit determined that the case was not ripe for review. *Id.* at 219.

In arriving at its decision, the *Robinson* court rejected the landowners' argument that their claim was "analogous to a physical takings claim." *Id.* The court observed that:

> [i]n the case of a physical invasion, the extent of the injury is known at the moment of the invasion. Further, the property owner incurs actual injury even if the government subsequently rescinds its action.

Id. In contrast, since Hawai'i's courts had never finally adjudicated the landowners' rights to the water they claimed, there was no way for the court to determine "the extent of the injury suffered by the private owners." *Id.*

Petitioner's claim of an unconstitutional judicial taking in this case is similarly unripe for review. Even accepting *arguendo* that the Hawai'i Supreme Court's

decision radically departed from prior state law on customary rights[8] and further assuming that judicial decisions can violate the Takings Clause,[9] the Hawai'i Supreme Court's judgment has not "interfered in any way" with Petitioner's use of its land. *Robinson*, 887 F.2d at 219. The decision presently imposes no restrictions on Petitioner's development plans and, thus, has not, as Petitioner alleges, "coerced the impressment of an easement" on Petitioner's property at Kohanaiki. Petition at 23. Petitioner has not suffered any quantifiable injury or physical invasion as a result of the Hawai'i Supreme Court's remand to the HPC for further proceedings. Accordingly, at this point, this Court simply cannot evaluate the traditional factors for judging whether an unconstitutional taking has occurred. *Williamson County*, 473 U.S. at 191.

---

[8] Of course, Respondents do not concede this point. *See, infra*, Part III.B.

[9] Respondents note that the judicial takings theory is "by no means a settled issue of law." *Corporation of Presiding Bishop v. Hodel*, 830 F.2d 374, 381 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1015 (1988). In the twenty-nine years since Justice Stewart first suggested this theory in his concurrence in *Hughes v. Washington*, 389 U.S. at 296-97, this Court has never relied on the judicial takings theory to decide a case. *See, e.g., Bonelli Cattle Co. v. State of Arizona*, 414 U.S. 313, 331 (1973) (judicial takings issue "a question which we find unnecessary to decide on our view of the case"), *overruled on other grounds, Oregon v. Corvallis Sand & Gravel Co.*, 420 U.S. 363 (1977). Since Petitioner's claims here are undeniably unripe, this case does not present a proper forum for this Court to consider this unsettled legal issue.

III. THE HAWAI'I SUPREME COURT'S ANALYSIS OF CUSTOMARY RIGHTS DID NOT DEPRIVE PETITIONER OF DUE PROCESS.

Petitioner's claim that the Hawai'i Supreme Court decision deprives it of due process of law should be rejected for at least two reasons. First, the court's decision remanding for further administrative hearings ensures that Petitioner can raise its due process claims at a later date. *See* Section A, *infra.* Second, Petitioner was not denied due process where, as here, the Hawai'i Supreme Court merely applied "background principles" of Hawai'i's unique property law. *See* Section B, *infra.*

A. The Hawai'i Supreme Court's Decision Ensures Ample Opportunities for Petitioner To Challenge Respondents' Claims to Customary Rights.

Petitioner will have plenty of process before limitations on the use of its property, if any, are imposed. Petitioner's situation is readily distinguishable from that of the plaintiffs in *Stevens v. City of Cannon Beach,* 854 P.2d 449 (Or. 1993), *cert. denied,* 114 S. Ct. 1332 (1994), where this was a concern to some members of the Court. In *Stevens,* the plaintiffs' application for a building permit to construct a seawall on the dry-sand portion of their property was denied based on customary use of the Oregon shore. Two of the justices of this Court favored granting certiorari on due process grounds since, before the permit application was denied, plaintiffs had not been afforded any "opportunity to make out their constitutional claim

by demonstrating that the asserted custom [was] pretextual." 114 S. Ct. at 1336 (Scalia, J., dissenting).

In contrast, before any final decision is made on Petitioner's SMA permit application, Petitioner will have ample opportunity to challenge the validity and extent of Respondents' claimed access rights at Kohanaiki. As the Hawai'i Supreme Court stressed, " '[o]pportunities shall be afforded all parties to present evidence and argument on all issues involved' in the contested case hearing held on remand." *PASH/Pilago II*, 903 P.2d at 1255-56, App. at 18a (*quoting* Haw. Rev. Stat. § 91-9(c) (1985 Repl.)). The Hawai'i Supreme Court clearly did not deprive Petitioner of due process by remanding to the HPC for yet *more* process.[10]

B. The Hawai'i Supreme Court Properly Applied Background Principles of Hawai'i Property Law.

In concluding that a contested case is required to allow Respondents to prove their customary usage of Petitioner's land, the Hawai'i Supreme Court did not

---

[10] In addition, Petitioner has already had an opportunity to state its case regarding the proper scope of customary rights in Hawai'i. Upon granting certiorari, the Hawai'i Supreme Court invited all parties to submit supplemental briefs addressing Petitioner's claim that protecting native Hawaiian rights on land proposed for development implicates the Takings Clause. *See PASH/Pilago II*, 903 P.2d at 1256, App. at 18a n.16. While Petitioner may disagree with the state court's resolution of that issue, Petitioner cannot complain that it has been deprived of its day in court.

invent new law, but merely applied pre-existing principles of this State's unique property law. In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), this Court explained that there can be no violation of the Takings clause if the "background principles of the State's law of property and nuisance" reveal that the challenged restrictions on land use "inhere in the [landowner's] title itself." *Id.* at 1029. *See also id.* at 1027 (no compensable taking if "proscribed use interests were not part of [owner's] title to begin with"); *id.* at 1028-29 ("we assuredly *would* permit the government to assert a permanent easement that was a preexisting limitation upon the landowner's title") (emphasis in original). The Hawai'i Supreme Court followed the *Lucas* court's guidance and extensively reviewed the central role of customary practices in the development of Hawaiian property law before concluding that Respondents are entitled to a contested case to challenge Petitioner's SMA permit application. Since Petitioner's claimed right to exclude a broad class of native Hawaiian gatherers was never a part of the "bundle of rights" it acquired with the title to its land at Kohanaiki, the Hawai'i Supreme Court could not have deprived Petitioner of any due process by simply acknowledging that fact.

Significantly, Petitioner is unable to point to any conflict between the Hawai'i Supreme Court's analysis of custom-based restrictions on land use and the ruling of any other state supreme court or federal court. On the contrary, Petitioner's own discussion demonstrates that American courts have embraced custom as a legitimate source of property law for more than two hundred years. Petition, at 20 n.10. This Court itself has long recognized

custom as creating legally cognizable property rights where the *bona fides* of the custom can be proven. *See, e.g., Cariño v. Insular Government of the Philippine Islands*, 212 U.S. 449 (1909) (recognizing Philippine Islands tribesman's ownership of land "in accordance with Igorot custom").

Petitioner's insistence that it possesses a near-absolute "right to exclude" native Hawaiian gatherers from its land ignores Hawai'i's unique status as the only state whose legal system evolved directly from that of a non-Western political entity, the Polynesian kingdom founded by Kamehameha I in the early Nineteenth Century. For more than one hundred fifty years, Hawai'i statutes have recognized custom-based limitations on the common law, *PASH/Pilago II*, 903 P.2d at 1258 n.21, App. at 24a n.21, and the constitution of the State of Hawai'i continues to affirm custom's important role today, Haw. Const. art. XII, § 7. *See also* Haw. Rev. Stat. § 1-1 (1993 Repl.). As the Hawai'i Supreme Court observed at the turn of this century:

> The New Englanders who early settled here did not come as a colony or take possession of these islands or bring their body of laws with them, though they exercised a potent influence upon the growth of law and government. The ancient laws of the Hawaiians were gradually displaced, modified and added to. The common law was not formally adopted until 1893 and then *subject to* judicial precedents and *Hawaiian national usage*.

Branca v. Makuakane, 13 Haw. 499, 504-05 (1901) (emphasis added).

Soon after the annexation of Hawai'i, this Court confirmed the validity of Hawaiian property concepts that, although unknown on the Mainland, are firmly rooted in Hawai'i's unique history and culture. In *Damon v. Territory of Hawai'i*, 194 U.S. 154 (1904), the plaintiff claimed ancient fishing rights over a fishing ground. *Id.* at 158 (plaintiff alleged right "to set apart one species of fish to the owner's sole use, or, alternatively to put a taboo on all fishing within the limits for certain months and to receive from all fisherman one-third of the fish taken upon the fishing grounds"). Justice Holmes, writing for the Court, observed that "[a] right of this sort is somewhat different from those familiar to the common law, but it seems to be well known to Hawaii. . . . " *Id.* While the asserted Hawaiian property right may have appeared "anomalous" to the Justices, the *Damon* Court affirmed that, since plaintiff's claim was firmly grounded in Hawaiian law, "there is nothing for the courts to do except to recognize it as a right." *Id.* (citation omitted).

In *Boquillas Land & Cattle Co. v. Curtis*, 213 U.S. 339 (1909), this Court recognized that New Mexico's adoption of the common law of England "is far from meaning that patentees of a ranch on the San Pedro are to have the same rights as owners of an estate on the Thames." *Id.* at 345. Similarly, as *Damon* suggests, Petitioner should not assume that the bundle of property rights it holds in Hawai'i should be identical to those of a landowner in Massachusetts, California, or eighteenth-century England. While Petitioner may disagree with the Hawai'i Supreme Court's conclusions regarding the scope of customary rights under state law, the Hawai'i court's extensive analysis of Hawaiian custom and tradition is fully

consistent with this Court's rulings in similar cases and disproves Petitioner's claim that the court's analysis was "pretextual." Petition, at 12.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be DENIED.

Respectfully submitted,

DENISE E. ANTOLINI,
Counsel of Record
LEA O. HONG
DAVID L. HENKIN
Sierra Club Legal Defense Fund
223 South King Street, 4th Floor
Honolulu, Hawai'i 96813
(808) 599-2436

CARL C. CHRISTENSEN
Native Hawaiian Legal Corporation
1164 Bishop Street, Suite 1205
Honolulu, Hawai'i 96813
(808) 521-2302